IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellant,

vs.

SHOSHONE COUNTY, a municipal corporation; JOHN F. FERGUSON, as treasurer and ex-officio tax collector of Shoshone County, Idaho, and HARRY A. ROGERS, clerk of the District Court and ex-officio auditor and recorder of Shoshone County, Idaho, and JOHN F. FERGUSON and HARRY A. ROGERS, individuals,

Appellees.

Appellant's Brief

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Appellant's Brief

This is a companion case to that of *The Washington Water Power Company vs. Kootenai County et al.,* also on appeal to the above entitled court. The two cases were tried together and the transcripts are substantially the same. It involves generally the same issues and was submitted on

the same record as the Kootenai County case. The only distinction is presented by Defendants' Exhibit 1 (Tr. of Exhibits, p. 373).

SPECIFICATIONS OF ERROR.

I.

The court erred in deciding that the full cash value of the property of appellant in the State of Idaho, except the lighting system in St. Maries, was the sum of $3,587,500.

II.

The court erred in deciding that the full cash value of the property of appellant in the State of Idaho, exclusive of the lighting system in St. Maries, was greater than the sum of $2,438,978.

III.

The court erred in deciding that the State Board of Equalization in assessing the property of appellant found that the value thereof was the sum of $3,587,500, exclusive of the lighting system in St. Maries.

IV.

The court erred in deciding that the State Board of Equalization found that the total actual value of the operating property of the appellant in the State of Idaho was the sum of $3,620,500.

V.

The court erred in deciding that the State

Board of Equalization intended its assessment upon the operating property of appellant to be 75% of the actual cash value thereof.

VI.

The court erred in deciding that the Public Utilities Commission of the State of Idaho valued the operating property of the appellant in Idaho, exclusive of the lighting system in St. Maries, at the sum of $3,587,500.

VII.

The court erred in deciding that the State Board of Equalization assessed the operating property of all the railroads, telegraph, telephone and other public utilities at 75% of its full cash value.

VIII.

The court erred in deciding that bank stock was assessed in excess of 50% of its actual cash value in Shoshone County.

IX.

The court erred in deciding that property of public utilities assessed by the State Board of Equalization situated in Shoshone County was assessed generally on a basis of 75% of its full cash value.

X.

The court erred in deciding that the State Board of Equalization assessed any property other

than that of appellant in Shoshone County at a rate greater than 50% of its full cash value.

XI.

The court erred in deciding that only $8,150,834 of the assessed value of Shoshone County is susceptible to criticism as being below full cash value.

XII.

The court erred in deciding that there has been any appreciation in the value of the operating property of appellant in Idaho or that any such appreciation substantially equals the depreciation thereof.

XIII.

The court erred in deciding that the value of the operating property of appellant in Idaho and subject to taxation in said state for the year 1918 was a sum in excess of the depreciated value thereof, as found by the Public Utilities Commission, to-wit, the sum of $2,487,999.00.

XIV.

The court erred in deciding that the property of appellant in Shoshone County should be required for the year 1918 to pay taxes upon any sum in excess of 50% of its full cash value on the second Monday in January, 1918.

XV.

The court erred in deciding that the appellant

should be required to pay taxes for the year 1918 in Shoshone County on its property in said county on any basis greater than 50% of the portion of $2,487,999 distributed in Shoshone County.

XVI.

The court erred in assuming or deciding that the railroad companies, telephone companies, and other public utilities, except appellant, had in fact paid taxes in the State of Idaho for the year 1918 on the basis of 75% of the value of their respective properties.

XVII.

The court erred in assuming or deciding that the railroad companies, telephone companies, and other public utilities had instituted no action either at law or in equity for the purpose of being relieved against their unequal or unjust assessment in said Shoshone County and for the purpose of being put on an equality with the property generally in said Shoshone County so that they would be required to pay taxes on the basis of 50% of the value of their respective properties the same as other property, exclusive of the property of this appellant, was required to pay by the taxing officers.

XVIII.

The court erred in assuming or deciding that the railroad companies, telephone companies, and

other public utilities had no cause of action for the recovery of moneys unlawfully exacted of them on account of taxes for the year 1918 because of the unequal and unjust assessment of their respective properties.

XIX.

The court erred in deciding that the mines in Shoshone County were assessed on a 100% basis for the year 1918.

XX.

The court erred in deciding that because mines were assessed according to the statute, which constitutes a partial exemption of their property, and that such assessment amounted to about one-half of the total assessment in Shoshone County, that appellant is entitled to no relief, even though all other property, except appellant's property, was assessed on a 50% basis and appellant's property was assessed on a 75% basis.

XXI.

The court erred in deciding that if mine improvements, bank stock, and property of railroad and telephone companies were assessed in Shoshone County at a higher rate than property was generally assessed, that therefore the appellant should be compelled to pay taxes at a higher rate than the owners of the general property of the county were required to pay.

XXII.

The court erred in undertaking to decide and adjudicate the rights of the railroad companies, telephone companies, and other public utilities which are not parties to this litigation and to determine appellant's rights on the basis of such attempted adjudication of rights of such other companies.

XXIII.

The court erred in dismissing the complaint and in denying relief to appellant as prayed for in the complaint.

XIV.

The court erred in deciding that appellant is subject to pay any penalty or interest upon any sum to the County of Shoshone or that any penalties or interest should be imposed.

ARGUMENT.

For the convenience of court and counsel, and in order to shorten the record, we omit from this brief the statement of facts and argument contained in the brief in the Kootenai County case, and will serve that brief together with this brief upon counsel in this case, and pray that that brief, as well as this brief, shall be considered as the appellant's briefs in this case and a part of the record thereof.

The point in this case not applicable to the

Kootenai County case arises out of the fact that there are valuable mines in Shoshone County while there are no productive mines in Kootenai County. The assessment for mines in Shoshone County is not based upon the value of the productive mines but under a statute consists solely of the annual net proceeds from the ore produced, plus $5.00 per acre for surface ground when patented, and improvements when valuable for other purposes. It is a matter of common knowledge that the actual value of the mines is several times the amount of the net proceeds in the year 1918 or any other year. This method of assessing the mines constitutes in fact a *partial exemption* of mining properties from taxation. In some states mining properties are exempted *in toto* from taxation. In Idaho they are assessed at perhaps 20% of their value. The learned trial judge failed to appreciate the rule applicable in this case because of such mining properties. That rule is, we submit, that where property is exempt from taxation in whole or in part, the increased burden thereby cast upon the property not so favored shall be borne by such property ratably and without discrimination.

The total assessed valuation of the property in Shoshone County for the year 1918 was $31,828,640. That amount was distributed as follows: Public utilities assessed by the State Board of Equalization, $6,356,243; producing mines assessed for tax-

ation upon their net profits, $12,916,645; mining improvements assessed by the local assessor, $3,876,-170; mineral lands assessed at $5.00 per acre, regardless of value, $154,645; bank stock, $374,103; other property within the sphere of the duty of the local assessor, $8,150,834.

It will be seen that the assessment of mining properties amounts to about one-half of the total assessment. The Idaho statute (Sec. 3360, Idaho Comp. Stats. 1919) provides: That mines after patent "shall be taxed at the price paid the United States therefor" or generally $5.00 per acre, and that the *net* annual proceeds of all mines shall be taxed, and that machinery used in mining and improvements which have a value separate and independent of such mines shall be taxed. The court held that for the purpose of this case this assessment of the mines in Shoshone County must be held to be a 100% assessment, although as a matter of common knowledge it is much less than a 50% assessment, probably less than a 20% assessment, and that the statute putting the mines in a privileged class prevented the appellant from obtaining any relief, although the appellant's property was assessed 50% higher than the general property of the county.

The court said in his opinion (Tr., p. 73):

> "Hence it is manifest that if, as we have expressly found in the other case, the plaintiff's property was assessed at seventy-five per cent

> of its actual value, the taxes demanded of it are not in excess of its fair share of the entire burden, for, as we have seen, the larger part of the assessment is strictly in accordance with or in excess of the statutory standard, while that of the plaintiff is twenty-five per cent below such standard and upon the same footing with the assessment of other public utilities. Without undertaking accurately to determine just what its proportion of the whole tax would be if all property were assessed strictly in accordance with the statute, obviously the amount would not be less than the demand of which it complains. It may be true that the method provided for the assessment of mines is inequitable, but the plaintiff does not question the validity of the statute prescribing it, and it must therefore be accepted as controlling."

In *Hanley vs. Federal Mining Co.,* 235 Fed. p. 769, the question of the validity of the statute was presented to the learned district judge, and he held the statute to be valid, notwithstanding the manifest discrimination in favor of the mining companies, upon the ground that the legislature was not prohibited by any Constitutional provision from making such discrimination or partial exemption. It is true that the appellant has not questioned the validity of that statute, but that fact is neither controlling nor pertinent.

We pointed out in the other brief that the universal holding in all cases where relief was granted to a taxpayer on account of over-assessment was to declare void such part of the assessment which was in excess of that of the general property as-

sessed; in other words, that if the general property had been assessed at 50% of its value and the complainant's property were assessed at 80% of its value, the court would declare all of such assessment in excess of 50% of its value to be void. No court heretofore has undertaken to act as an equalization board.

In the court's opinion in the Kootenai County case, referred to in his opinion in this case, the court said (Tr., p. 69):

> "By the record as a whole I am impelled to the conclusion that with the knowledge and acquiescence of some, if not all, of the members of the State Board of Equalization, the understanding was reached by the assessors at the Boise meeting that the assessments should be on a fifty per cent basis, and that generally that standard in fact was recognized in making the assessments. Wide departures there doubtless were in isolated cases, and both higher and lower valuations can be found, but such was the recognized rule. The record tends to show that in many instances, and in some counties generally, agricultural lands were assessed at a figure substantially below fifty per cent. If we assume that in many instances and in some localities quite generally certain classes of city property were assessed as high as seventy-five per cent, the fact still remains that generally the assessing officers recognize a standard of fifty per cent, and that with knowledge of that standard the State Board intentionally assessed the plaintiff's property on a basis of seventy-five per cent. The fact that officers either wilfully or inadvertently made exceptions to the rule they had improperly agreed

> upon, and that consequently some individuals in the classes to which such rule relates are the victims of inequality, does not bar this plaintiff from relief."

Mr. Herrick, the county assessor of Shoshone County, was at this Boise meeting, and admits that he did not seek to injure his county by assessing differently than the other assessors. He said (Tr., p. 77): "In assessing agricultural lands and business property, etc., I should have to admit that it was my effort to assess at near fifty per cent."

Now the learned district judge conceded that the general property of the state was assessed at not to exceed 50% of its valuation, and in pursuance of an agreement among the assessors to that effect, and that the assessor of Shoshone County did not undertake to violate that agreement, and further that the property of the appellant was assessed at at least 75% of its value, but the learned judge denies the appellant any relief whatsoever, and for the reason that the mines have been put into a privileged class by the legislature and partially exempted from taxation. To state the court's reasoning in the simplest way we will assume the situation to be as follows: The total assessment is $10,000,000. Of that $5,000,000 represents the net profits from the mines. $1,000,000 represents the property of the appellant assessed at 75% of its value. $4,000,000 represents the property of the farmer, the merchant and other general prop-

erty assessed at 50% of its value. The court recognizes the fact that these mining properties have a value several times their annual net profits. The court reasons that if there were no mining properties and the assessed valuation of the whole property was only $5,000,000, $1,000,000 being on a 75% basis and representing the property of the appellant, and $4,000,000 on a 50% basis representing the general property of the county, that then the appellant would be entitled to relief, which relief would be cutting off as void all of appellant's assessment in excess of 50% of the value of its property. The court reasons that, although the mining properties are assessed at say 20% of their value, that inasmuch as that is permitted by statute, the court will assume that such mining property is assessed at 100% of its value, and as such mining property represents about one-half of the property in the county, there is more property assessed above 75% of its value than there is below 75% of its value, and therefore appellant is without relief. In other words, in any county where there are mining properties of great value, the assessor may with perfect impunity assess farming land, residence property, timber land, stocks of goods, etc., on a 50% basis, and the State Board of Equalization may penalize the foreign corporation which is engaged in the hydro-electric busi-

ness in the county by assessing its property at 75% or a higher per cent of its value.

That is to say there may be two rules of assessment of hydro-electric property in the State of Idaho, under an agreement among the assessors such as is in evidence in this case. In Smith County, where there are no mining properties, such electric property must be assessed at 50%. In Jones County, where there are mining properties, it may be assessed at 75% or higher.

The correct rule is, we submit, that where property is exempt from taxation, in whole or in part, the increased burden thereby cast upon property not so favored shall be borne by such property ratably and without discrimination. The general property of the county as well as of the state being intentionally assessed on a 50% basis, the law requires appellant's property to be assessed on the same basis.

The unwarranted assumption of the court that other utilities were assessed at 75% of their full value, and his reasoning in regard thereto, is fully argued in the brief in the Kootenai County case, as well as his reasoning in respect to bank stock.

Our discussion in the other brief of the valuation of the property of this appellant and as to penalties and interest and the points made in respect to other matters, we pray to be considered as though repeated in this brief.

We submit that appellant is entitled to the relief prayed for in its bill of complaint.

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